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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-904

CASWELL DEBERRY, ... Petitioner,

v.

COMMONWEALTH OF KENTUCKY, ... Respondent.

ON WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a substantial federal question is presented by the holding of the trial court that the evidence used to convict petitioner was not obtained as a result of an illegal search and seizure.

STATEMENT OF THE CASE

Petitioner has set forth in his petition a concise and accurate statement of the case and the Respondent accepts same except as developed in subsequent argument.

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED TO THIS COURT FOR CONSIDERATION BECAUSE THE TRIAL COURT PROPERLY RULED THAT THE EVIDENCE WAS NOT THE PRODUCT OF AN ILLEGAL SEARCH AND/OR SEIZURE AND WAS THEREFORE ADMISSIBLE.

The question presented to this Court by Petitioner is one of fact and directly relates to whether or not the police can investigate information relayed to them by an unnamed informant.

On November 20th, 1970, the desk at the Louisville Police Department received a call that property stolen in a break-in the previous night was located at a certain address and was going to be moved that night by truck. (Transcript of Evidence, hereafter "TE," 4, 17, 18). There were no names given as to who was going to move the stolen property. After this brief recitation of the facts in this case, this Court is faced with the crux of the case. Exactly what were the police to do? There assuredly was insufficient information to obtain a search warrant. However to ignore the information because it did not supply the requisite probable cause to obtain a search warrant

would have amounted to a dereliction of duty. Therefore the police began the only possible course of action available to them, i.e., an independent investigation. The police set up a "stake-out" of the location at approximately 6:30 p.m. on the night of the 20th. (TE 20). After remaining at this location for approximately two and one half hours, an alert was given that the truck which the officers had been sitting on was moving down the alley (TE 18, 19). The police proceeded to block the alley thereby stopping the truck (TE 9). The officers got out of their cars and approached the truck (TE 79). The truck was of the open van type (TE 12) and upon approaching the truck the tires were immediately visible as it was so completely loaded with tires that they extended out to the engine well of the truck (TE 80, 104). As a matter of fact, Petitioner was standing up on the passenger side of the truck because his seat was folded back to make more room for the tires (TE 79, 80). The officer in charge, Sgt. Davis, then compared the serial numbers on the tires with a list of those stolen the night before and determined that they were the ones that had been stolen (TE 80).

It is readily apparent that the stolen property was in plain view when the officers approached the truck. However, for the stolen property to be admissible under the "plain view" doctrine, it is necessary that the police seizing the property have the right to be in the place where the seizure occurs. Therefore, the case at bar solidly presents to this Court the question — do

the police have the right to stop a vehicle during the course of their investigation?

The Kentucky Court of Appeals drew a well reasoned analogy between the case at bar and *Terry* v. *Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). It would be difficult to improve upon the language of the Kentucky Court wherein they stated

> "A distinction is made upon the basis of the purpose of the seizure and officers are permitted to make brief stops or seizures of persons for purposes of investigation when the circumstances are such that the action appears reasonable when the need to investigate is balanced against the invasion which the seizure entails. In such cases no probable cause need exist at the time for believing the person stopped had actually committed a crime. Such investigatory stops are limited in time and scope to what appears reasonable under the circumstances in any individual case and the investigation conducted by the officer during such a stop cannot exceed limits otherwise prescribed by law. . . ." Petitioner's Appendix, p. 33.

See also *Sibron* v. *New York*, 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968).

In *Adams* v. *Williams*, 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972) this Court stated

> "* * * The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * *. A

> brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." 407 US at 145, 146.

Thus it is clear that the police have the right to stop or in a technical sense seize an individual for investigatory purposes. The same is also true for stoppage of a motor vehicle. In *Brinegar* v. *United States,* 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949), this Court held that it was proper to stop a vehicle for investigatory purposes. While in the *Brinegar* case, probable cause to search and arrest did not arise until Brinegar made an incriminating response to an investigatory question asked by one of the agents, in the case at bar probable cause to search and arrest arose the moment the police approached the truck as the stolen property was readily visible. Upon the approach to the truck by the police and the sighting of the tires probable cause arose and the officers were entitled to check the tires against the list of stolen tires which they possessed. Upon confirmation that the tires were indeed the ones stolen the night before, the officers had the probable cause necessary to place Petitioner under arrest. See also *Carroll* v. *United States,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *Chambers* v. *Maroney,* 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970).

The case of *Whiteley* v. *Warden,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) cited by Petitioner

offers strong reasons for affirming Petitioner's conviction. In that case this Court stated

> "This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the stop alone. Draper v United States, 358 US 307, 3 L Ed 2d 327, 79 S Ct 329 (1959). See Spinelli v. United States, supra, at 423, 21 L Ed 2d at 647. But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in Draper itself, were in the process of committing the felony. See the opinions of the Court and that of Mr. Justice White concurring in Spinelli v. United States, 393 US 410, 21 L Ed 2d 637, 89 S Ct 584 (1969). . . ." 401 U.S. at 567.

CONCLUSION

The Kentucky Court of Appeals correctly ruled that the police have the right to stop a vehicle for investigatory purposes especially when the information which lead to the investigation centers around that vehicle and furthermore any evidence adduced by such an investigatory stop is admissible. Therefore the decision of the Kentucky Court should be affirmed and the petition for certiorari denied.

Respectfully submitted,

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